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IN THE

Supreme Court of the United States

October Term, 1977.

No. 77- 77-223

CLAYMONT SCHOOL DISTRICT and
STANTON SCHOOL DISTRICT,

Petitioners,

v.

BRENDA EVANS, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

JAMES T. MCKINSTRY,
RICHARDS, LAYTON & FINGER,
4072 DuPont Building,
Wilmington, Delaware. 19899
Attorneys for Claymont School District and Stanton School District, Petitioners.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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Petitioners, Claymont School District and Stanton School District, respectfully request that a Writ of Certiorari issue from this Court to review the judgment of the United States Court of Appeals for the Third Circuit (hereinafter "Third Circuit") in cause numbers 76-2103 through 2107.

OPINIONS BELOW.

The opinions of the Court of Appeals for the Third Circuit are not yet reported. They are set out as Appendix A to the Petition for Writ of Certiorari filed by Delaware State Board of Education in No. 77-131 at pages A1 to A41. The opinions of the United States District Court for the District of Delaware, sitting as a three-judge court, are reported at 416 F. Supp. 328 (1976) and are also

set out as Appendix B to the Petition of the Delaware State Board of Education at pages A42 to A112. Other pertinent opinions of the three judge court below are reported at 393 F. Supp. 428 (1975) and 379 F. Supp. 1218 (1974).

JURISDICTION.

The opinion of the United States Court of Appeals was filed on May 18, 1977. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

QUESTIONS PRESENTED.

1. Can an inter-district remedy in a school desegregation case include local governmental entities such as suburban school districts which operate unitary school systems absent a predicate of intentional or purposeful discriminatory acts by such districts and an incremental segregative effect involving them?

2. Can an inter-district remedy in a school desegregation case be ordered where it would be highly speculative to determine which constitutional violation has been committed as well as the incremental segregative effects thereof?

3. Can in inter-district remedy in a school desegregation case include local governmental entities such as suburban school districts when based on the cumulative impact or effect of various acts of public officials other than such suburban school officials?

STATEMENT OF THE CASE.

This is an application for a Writ of Certiorari by the Claymont School District and Stanton School District seeking a review of a judgment dated May 19, 1977, entered by the District Court for the District of Delaware pursuant to the mandate of the Court of Appeals as specified in its Opinion of May 18, 1977 (A20-24). The judgment ordered an inter-district desegregation plan which has the effect of desegregating ten suburban school districts including the two petitioning districts, which maintain unitary school systems, *Evans v. Buchanan*, 393 F. Supp. 437 (D. Del. 1975) at p. 437; 416 F. Supp. 328 (D. Del. 1976) at p. 339 (A52), and which have not been found to be unconstitutionally segregated, in addition to the Wilmington School District which has been found to have operated a dual school system and to have vestiges of racially segregated schools. The Court's judgment threatens to dissolve all ten of the suburban school districts and merge them with the Wilmington School District into one large super district. There was no evidence submitted to the court below, nor any finding, that, but for the alleged constitutional violations, such a super district would exist in northern New Castle County containing approximately 60% of the public school children of the State of Delaware. Nor was there any finding that, but for the alleged constitutional violations, the racial composition of petitioners' schools would be any different than what they are today.

The history of this litigation is well documented in the reported opinions of the three-judge Court below as well as in the opinion of the Third Circuit of May 18, 1977. We will not undertake to record a detailed history of the public education system of Delaware at this time. However, we believe that a brief summary of the more salient facts of such history is pertinent background to this certiorari proceeding:

1. Since 1829, the State of Delaware has followed a policy of comparatively small autonomous school districts throughout the three counties of the State and has not utilized county wide school districts as has been the case in some other states.

2. Since 1905, the geographical boundaries of the Wilmington School District have been coterminous with those of the City of Wilmington. *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del. 1975) at 443, 451.

3. Since, at least, the early 1960s, all of the ten suburban school districts affected by the judgment below have maintained unitary autonomous districts. Except for one, the De La Warr School District, they have done so since the 1950s. *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del. 1975) at 437.

4. From July 24, 1961, to July 27, 1971, no questions were raised by anyone concerning school segregation in Wilmington or New Castle County.[1] At one point during that period, H. E. W. pointed to Delaware as the first border state which has "completely eradicated the dual system" *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del. 1975) at 451.

5. Following a hiatus since June 26, 1961, at which time the District Court for the District of Delaware approved a plan prepared by the State Board of Education which included the continuance of Wilmington's historic school boundaries,[2] this litigation was reactivated on July 27, 1971, when the current plaintiffs filed a petition for supplemental order claiming violation of the constitutional rights of black students in the Wilmington School District.

1. There were two isolated exceptions not here pertinent which are referred to in f.n. 19 on page 437 of 393 F. Supp.

2. *Evans v. Buchanan*, 379 F. Supp. 1218 (D. Del. 1974), at 1221, f.n. 2.

6. On July 12, 1974, the District Court for the District of Delaware, sitting as a three-judge Court, found that because many schools in Wilmington which had been black schools prior to *Brown v. Board of Education*, 347 U. S. 483 (1954) had remained identifiably black until 1975, the dual school system in Wilmington had not been eliminated.[3] The Court asked the State Board of Education to submit alternative desegregation remedies, one limited to the boundaries of the existing Wilmington School District and the other incorporating school districts in northern New Castle County. The inter-district remedy was requested for the reason of the "central issue . . . whether an effective remedy for the continuing school segregation in Wilmington may be found within the existing boundaries of the Wilmington School District." Prior to submission of the requested plans, the case of *Milliken v. Bradley*, 418 U. S. 717 (1974) was decided by the United States Supreme Court and, in the light of that decision, the court below gave suburban New Castle County School Districts an opportunity to intervene and present evidence.

7. On March 27, 1975, the trial court rendered an opinion, Layton, J., dissenting, in which it held that certain provisions of the Educational Advancement Act of 1968, 14 *Del. C.* § 1001 et seq. which excluded the Wilmington School District from eligibility for consolidation with contiguous districts were unconstitutional. *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del. 1975). The Court proceeded to enter an interlocutory order on April 16, 1975, enjoining the State Board of Education and other parties, including the Claymont School District and Stanton School District, to submit intra-district and inter-

3. The Court did not explain or consider how "virtually all-black schools" could become non-black schools in a school district when the district was moving from a white-black ratio of 72-28 percent in 1954 to 14-83 percent in 1974.

district plans to remedy the segregation found by the Court to exist within the Wilmington School District. An appeal was taken from the interlocutory injunctive order of April 16, 1975, to the United States Supreme Court. The interlocutory injunctive order was summarily affirmed without an opinion, *Buchanan v. Evans*, 423 U. S. 963, 46 L. Ed. 2d 293, 96 S. Ct. 381 (1975), Justices Rehnquist and Power and Chief Justice Burger dissenting.[4]

8. While the appeal to the Supreme Court was pending, the parties were submitting plans of remedy to the three-judge Court below and extensive hearings were being held. On May 19, 1976, after this Court's summary affirmance, the three-judge Court rendered a further opinion on remedy and entered its final judgment on June 15, 1976. *Evans v. Buchanan*, 416 F. Supp. 328 (D. Del. 1976). The opinion and order (A115) for the first time, included petitioners in the far-reaching inter-district remedy. Appeals were taken to the Third Circuit Court of Appeals and to the United States Supreme Court from the lower court's final judgment. The appeal to the Third Circuit was

4. There has been disagreement as to the significance of this Court's summary affirmance and what was intended by it. However, even if it is assumed, arguendo, that the Court of Appeals was correct in holding that this Court affirmed a finding "that one or more inter-district constitutional violations" had taken place and that this ruling now constitutes the law of the case, it should be noted that neither the order nor judgment that was then appealed to this Court, nor the supporting opinions thereto, i.e., 379 F. Supp. 1218 and 393 F. Supp. 428 held or found that the Claymont or Stanton Districts were implicated in any violation or involved in the incremental segregative effect of any inter-district violation. Accordingly, not even an inflexible application of the law of the case rule to this case affects the petitioners, the Claymont and Stanton School Districts. It was not until the three-judge Court's final judgment of June 15, 1976, and its supporting opinion, 416 F. Supp. 328, that it was held that the petitioning districts should be included in the remedy even though no specific finding of involvement or implication by the Claymont or Stanton Districts was made at that time.

stayed pending the procedings in the United States Supreme Court. This Court ultimately dismissed the appeal for want of jurisdiction. The matter then proceeded in the Third Circuit.

9. The appeal to the Third Circuit Court of Appeals was heard and considered en banc. By a vote of 4 to 3, the Court of Appeals affirmed the final judgment of the three-judge Court with certain modifications. More specifically, the majority of the Court:

(a) Concluded that it was precluded from reviewing the three-judge Court's finding that an inter-district constitutional violation had taken place in the light of this Court's summary affirmance in *Buchanan v. Evans*, 423 U. S. 963, 46 L. Ed. 2d 293, 96 S. Ct. 381 (1975) even though the Court conceded that it would be "highly speculative" to determine which of eight possible violations were "necessarily decided" by the summary affirmance. The majority held that "one or more inter-district constitutional violations were found by the District Court and affirmed by the Supreme Court" and suggested that, if the defendants (including petitioners herein) disagreed, they should seek review by this Court (A13). The three judge dissent agreed that the question of whether the finding of a constitutional violation emanating from the Educational Advancement Act was affected by this Court's subsequent decisions in *Washington v. Davis* and *Village of Arlington Heights* was "in the province of the Supreme Court and not of the Court of Appeals" and observed that petitioners' argument in that regard "merits serious consideration" (A37).

(b) Concluded that the remedy must correct the constitutional violation and eradicate its effects by returning the school system and its students, as nearly as possible, to the position they would have been in but for the

constitutional violation; but, at the same time, made the task impossible by leaving to speculation the question of which constitutional violations were involved as well as the effects, if any, of such violations.

(c) Approved the inclusion of petitioners, Claymont School District and Stanton School District, in the remedy (as well as other suburban districts contiguous and noncontiguous to the City of Wilmington) even though the trial court had found that they maintained unitary school systems and in the absence of a finding by the trial court that these petitioners were implicated in the violation or that there was an incremental segregative effect involving the petitioners. Nevertheless, the majority mandated that the restructuring or dissolution of petitioners and eight other unitary suburban districts would be an appropriate remedy even though the lower court had not found that a super district would have existed in northern New Castle County "but for" the alleged violations.

Petitioners, Claymont School District and Stanton School District, are two of the five non-contiguous suburban school districts that may be dissolved by reason of the Third Circuit's rulings of May 18, 1977. The two school districts are similarly situated in that they are suburban school districts, operate unitary school systems and are not contiguous to the boundaries of the Wilmington School District. Each district is administered by its own school board of five citizens elected by the voters of the district.[5]

Prior to the Educational Advancement Act of 1968, both districts were non-contiguous to the Wilmington School District and could not have been consolidated with the Wilmington School District unless other districts situ-

5. This is true of all but one of the ten suburban districts, the Alexis I. duPont School District, whose board is appointed. Wilmington's board is also appointed.

ated in between Claymont and Stanton were also consolidated. In point of fact, the State Board of Education in implementing the provisions of the Educational Advancement Act of 1968 in New Castle County did not consolidate more than two contiguous districts into any new reorganized district with one limited exception.

The Claymont School District has further unique characteristics. Claymont is the only remaining community in New Castle County, other than Wilmington, which has its own school district within its boundaries. Although an unincorporated area, it is a compact community with its own fire department and post office. It has traditionally had its own school district and the support of public education in the district has been good through the years. Claymont was one of the few suburban districts which were not involved in a consolidation or merger under the Educational Advancement Act of 1968.

Claymont is the only suburban district in New Castle County which is a "walk in" district. Its pupils and parents are not accustomed to busing even within the district except in a small minority of cases. Approximately 10% to 11% of the students are bused within the district. There was testimony at the hearings below that the socio-economic characteristics of the Claymont community are such that it is likely that mandatory busing would be more difficult to implement smoothly within the district than within other suburban districts.

Both of these autonomous school districts have been operating unitary systems. Neither have been found to have committed an unconstitutional act. No finding has been made and no evidence has been cited to the effect that a racially discriminatory act has been committed in another district which has caused racial segregation in either the Claymont or Stanton School Districts. Yet, the Courts below have decreed that they may be abolished.

REASONS FOR GRANTING THE WRIT.

I. The Decision of the Case Below Stands Alone in That it Is in Direct Conflict With This Court's Rulings and Decisions Beginning With *Milliken I* and Continuing Through *Dayton* as Well as the Decision of the Fourth Circuit Court of Appeals in *Bradley v. School Board of Richmond.*

This Court has made it abundantly clear that, in the setting of a school desegregation case, a desegregation remedy cannot be decreed by a federal court based upon the violation of the Fourteenth Amendment in the absence of a showing that an "incremental segregative effect" has resulted from an intentional or purposeful act on the part of school officials. *Milliken v. Bradley,* 418 U. S. 717, 41 L. Ed. 2d 1069, 94 S. Ct. 3112 (1974); *Hills v. Gautreaux,* 425 U. S. 283, 47 L. Ed. 2d 792, 96 S. Ct. 1538 (1976); *Washington v. Davis,* 426 U. S. 229, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 45 U. S. L. W. 4073 (Jan. 11, 1977); *United States v. Board of School Commissioners of the City of Indianapolis,* 541 F. 2d 1211 (7th Cir. 1976), vacated 45 U. S. L. W. 3508 (January 25, 1977); *Austin Independent School District v. United States,* — U. S. L. W. — (December 6, 1976); *Dayton Board of Education, et al. v. Brinkman, et al.,* 45 U. S. L. W. 4910 (June 27, 1977); *Milliken v. Bradley,* 45 U. S. L. W. 4873 (June 27, 1977); *School District of Omaha v. United States,* 45 U. S. L. W. 3850 (June 29, 1977); *Brennan v. Armstrong,* 45 U. S. L. W. 3850 (June 29, 1977).

The interlocutory injunctive order (A113) which was summarily affirmed by this Court in *Buchanan v. Evans,* 423 U. S. 963, 46 L. Ed. 2d 293, 96 S. Ct. 381 (1975) was

entered by the majority judges of the three-judge Court below following that court's opinion which is reported in 393 F. Supp. 428. In that opinion, certain provisions of a state statute, the Delaware Educational Advancement Act, 14 *Del. C.* § 1004(c)(4) were held to be in violation of the Fourteenth Amendment and the basis for an inter-district desegregation remedy.[6] Even though the court expressly found that the statute had *not* been enacted with a racially discriminatory purpose or intent, 393 F. Supp. at p. 439, racial impact or effect was found to be a sufficient predicate for the finding of a constitutional violation on which an inter-district remedy could be based. Further, the court did not find that there had been an incremental segregative effect flowing from that violation. As of the date of the three-judge court's opinion and order, only *Milliken I* had been decided by this Court. Therefore, the court below did not have the benefit of the clarity of the subsequent decisions of the court beginning with *Hills v. Gautreaux.*

We respectfully submit that the summary affirmance by this Court of the three-judge court's order of April 16, 1975, was not intended to be an affirmance of the court's holding that the discriminatory effect or impact of the statute was a constitutional basis for inter-district remedy in the light of the affirmative finding by the court of an absence of intent or purpose since such a holding by this Court would be contrary to the rulings of this Court in the above-cited cases. If the summary affirmance was intended to affirm the lower court's holding, we submit that it must be deemed to have been reversed by *Washington v. Davis.* Any other analysis of the summary affirmance

6. The three-judge court also discussed other "violations" but made no findings with respect to intent or purpose nor as to incremental segregative effect. The other violations are identified in the dissenting opinion of Judge Garth (A27-28).

would set this case apart from all of the others. The dissenting Justices in *Buchanan v. Evans*, 423 U. S. 963, 46 L. Ed. 2d 293, 96 S. Ct. 381 (1975) inferred that the majority of this Court undertook to resolve issues other than the "Milliken" issues by its summary affirmance and urged that an opinion be written by the Court denominating the "issues the Court conceives to be resolved by its summary affirmance." This inference appears to have been verified by the various decisions of this Court since the date of the summary affirmance in this case.

II. This Court's Summary Affirmance Has Been the Source of Confusion as to Its Significance in the Court Below and in Other School Desegregation Cases and Should Be Reviewed.

This Court should note the three-judge court's conclusion as to the significance of the summary affirmance. At page 334 of 416 F. Supp. (A42-43) the Court summarized its prior findings and cited this Court's affirmance. Those findings included "that the segregation was never erased; and that this segregation resulted from a combination of factors, including demographic and housing patterns initiated and supported by state action . . . ". At p. 339 of the same opinion, the Court stated:

> "We need not catalogue the set of violations with regard to housing and zoning set forth in the last opinion *affirmed by the Supreme Court* . . ." (Emphasis supplied, A52)

Thus, it is apparent that the trial court below viewed this Court's summary affirmance as supporting the proposition that the constitutional predicate for an inter-district school desegregation remedy may be made out by showing that demographic and housing and zoning patterns have affected the racial balance of adjacent school districts even

though school authorities have had no involvement in them. We know of no Supreme Court authority for such a proposition. In fact, it cannot be squared with various views expressed by the Justices of this Court.[7] Conceivably, other trial courts may be laboring under the same misconstruction of this Court's summary affirmance.

Opinions of circuit courts elsewhere have reflected confusion over the significance of this Court's summary affirmance. Thus, in *U. S. v. Board of School Commissioners of City of Indianapolis*, 541 F. 2d 1211 (7th Cir. 1976), the majority opinion of the Court of Appeals for the Seventh Circuit discussed and cited *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del. 1975), *aff'd* 423 U. S. 963, 96 S. Ct. 381, 46 L. Ed. 2d 293 (1975) for the proposition that racial impact and effect of state legislation was a sufficient basis for an inter-district school desegregation remedy and pointedly noted that "[T]he Supreme Court summarily affirmed". 541 F. 2d at 1222. It is significant to observe the dissenting judge's observation at p. 1226 that the Indianapolis case was briefed before the Seventh Circuit prior to this Court's decision in *Washington v. Davis* and that the appellees assumed that a finding of a racially discriminatory purpose was not required.[8] The three-judge

7. In *Dayton* emphasis is given to the redress of violations on the part of 'school officials" or "school boards". In *Austin*, Justice Powell's concurring opinion pointedly observes that racial and ethnic imbalance in urban schools is the result of imbalance in residential patterns which "are typically beyond the control of school authorities". *Milliken I* spoke in the context of acts of school officials or public officials acting in educational matters. *Swann* warned against overloading the school authorities with all of the "baggage" of racial prejudice.

8. This Court made a similar observation in *Village of Arlington* at 45 U. S. L. W. 4078, noting that the case was tried and then reviewed in the Court of Appeals before *Washington v. Davis* and that "respondents proceeded on the erroneous theory that ". . . a racially discriminatory effect . . . was, without more, unconstitutional."

court's decision on liability below, based upon a finding of racial impact and effect and including an express finding of no intent or purpose, as well as this Court's summary affirmance, were also decided prior to the *Washington v. Davis* decision. In any event, this Court has remanded *U. S. v. Board of School Commissioners of City of Indianapolis* and its racial impact theory to the Seventh Circuit for reconsideration in the light of *Washington v. Davis.* It would appear, therefore, that the Seventh Circuit's analysis of the significance of the summary affirmance of the case below was incorrect. The Third Circuit majority opinion below would appear to be consistent with the Seventh Circuit's analysis of the significance of this Court's summary affirmance and should be reviewed by this Court.

In comparison with the Seventh Circuit's treatment of *Evans v. Buchanan* is the citation of the case, including its summary affirmance by this Court, by the Court of Appeals for the First Circuit in *Morgan v. Kerrigan,* 530 F. 2d 401 (1st Cir. 1976) at p. 422, wherein the Court states that "racial isolation imposed by historic school district boundaries . . . becomes constitutionally significant only when the district boundaries are drawn with segregative intent, *Evans v. Buchanan,* 393 F. Supp. 428, 445-46 (D. C. Del.) *aff'd* 423 U. S. 963, 96 S. Ct. 381, 46 L. Ed. 2d 293 (1975) . . .". Since the majority of the three-judge court in *Evans v. Buchanan* clearly and expressly did not find segregative intent and, indeed, made a finding as to the absence of such intent, the First Circuit Court of Appeals must have rationalized this Court's summary affirmance in the light of this Court's subsequent decisions by concluding that the three-judge majority must have found racial intent or purpose, the clear language of their opinion to the contrary notwithstanding.

Thus, the analysis of the Seventh Circuit of this Court's summary affirmance appears to be in contradiction

to the analysis of the First Circuit. The First Circuit's analysis, in turn, is in direct contradiction of the clear language of the three-judge court below and would appear to be based upon the assumption that this Court would not intend to make a decision in this field of law inconsistent with the long line of cases which have been handed down since the date of this Court's summary affirmance.

The proceedings below should be reviewed by this Court to dispel the confusion that the Third Circuit was confronted with as well as the precedential significance of the case in other school desegregation cases throughout the country.

III. Assuming, Arguendo, That This Court Affirmed the Three-Judge Court's Finding of a Constitutional Predicate for an Inter-District Remedy, the Action of the Court of Appeals Precludes Petitioners From Any Appellate Review of the Trial Court's Finding That They Were Implicated in the Violation and Thus Subject to Being Included in an Inter-District Remedy.

The opinion of the majority judges of the three-judge court on liability which formed the basis for the issuance of the interlocutory injunctive order of April 16, 1975 made no findings of liability as to the petitioning suburban school districts of Claymont and Stanton nor of their involvement in any of the suggested violations.

More specifically, and using the eight possible inter-district violations suggested [9] by the three judges' dissent to the Third Circuit's opinion, the only passing reference to either the Claymont or Stanton School Districts in the

9. The word "suggested" is used advisably since it is not clear that the three-judge court intended that each of the alleged acts constituted a violation upon which an inter-district remedy could be based or merely referred to them as historical events.

trial court's opinion of March 27, 1975, is found at p. 433 of 393 F. Supp. wherein it was observed by the Court that in the 1954-55 school year, some *white* students from the Claymont district attended Wilmington schools. Footnote 7 on page 433 identifies seven suburban districts in which a total of 191 black students resided who attended Wilmington schools in 1954-55. Neither Claymont nor Stanton were so identified. This single reference to Claymont does not relate even to the pre-*Brown* inter-district transfers of a small number of suburban black students to black Wilmington schools, since the reference to Claymont involves white and not black students.

Neither the order appealed from in 1975 nor its supporting opinions made any findings as to unconstitutional acts by the Claymont or Stanton school officials nor do they suggest any implication in any way. The court merely concluded that it would "consider" inter-district as well as Wilmington only remedies. 393 F. Supp. at p. 446. It's specific holding was that the Court would consider plans "(b) incorporating other areas of New Castle County". No holding was made as to which "areas" would be considered. No findings were made that such areas would or could include school districts non-contiguous to Wilmington such as petitioners. No finding was made that either Claymont or Stanton were implicated or involved in the violation or in the incremental segregative effect. This was the posture of the case at the time of this Court's summary affirmance.

It wasn't until the opinion of May 19, 1976, which formed the basis for the Court's final judgment of June 15, 1976, that the majority members of the three-judge court held that Claymont and Stanton should be included in the inter-district remedy. In doing so, the Court made no findings of implication in any constitutional violations by Claymont or Stanton school officials. Nor did the Court

make any findings of the presence of an incremental segregative effect within these districts. Yet, the Court held that it could directly interfere with these local governmental entities and restructure them.

The Court's actions were contrary to *Milliken I* and *Hills v. Gautreux,* which had already been decided. *Hills* had been decided but a month before the Court's opinion of May 19, 1976 and after briefing had been completed by the parties. The parties were not asked to consider and brief the significance of *Hills.* The Court's opinion predated *Washington v. Davis* by about a month and, therefore, the Court did not have the benefit of this Court's opinion in that case. The opinion of May 19, 1976 (as well as the earlier opinion of March 27, 1975) is in direct contradiction with those cases and those that have followed. For the first time, the Claymont and Stanton school districts were found to be subject to dissolution by judicial fiat and to be involved in an inter-district remedy so as to remove the remaining vestiges of a dual school system in the Wilmington School District.

Petitioners, Claymont and Stanton School Districts, appealed to this Court. The appeal was dismissed for lack of jurisdiction. *Delaware State Board of Education v. Evans,* — U. S. —, 45 U. S. L. W. 3394 (Nov. 29, 1976). Petitioners then pursued their appeal to the Third Circuit only to find that an appellate review of the constitutional violation issues at that level was precluded by the law of the case principle because of this Court's summary affirmance. They were told by the Court of Appeals that it would be too "speculative" to determine which violations they had been implicated in. Thus, the petitioners, Claymont and Stanton School Districts, together with other suburban districts, will be deprived of any appellate review in this matter unless the Court grants this petition for certiorari. Although they have been found to have operated unitary

school systems and although they have never been found to have been implicated in any act with the intent or purpose of discriminating against Wilmington's black children, and although they have never been found to have committed any acts having a discriminatory effect or impact upon Wilmington's black children, they are to be involved in an inter-district remedy with probable dissolution.

The final judgment of the three-judge Court contemplates "a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation". *Hills v. Gautreaux*. We submit that there should be an appellate review of this action. It has been denied these petitioners. This is not the ordinary situation where an intermediate court has previously reviewed the acts of the trial court. We urge this Court to exercise its discretion so as to assure these petitioners one appellate review of the decision to restructure and, probably, to dissolve them.

IV. Assuming Arguendo That This Court's Prior Summary Affirmance Was Intended to Affirm the Three-Judge Court's Holding of an Interdistrict Violation, the Court of Appeals Committed Error in Refusing to Determine Which Findings Were Necessarily Determined by the Summary Affirmance.

The Court of Appeals held that it was precluded from reviewing the findings and conclusions of the three-judge court on the question of liability because of the application of the law of the case principle. The court stated that "constitutional questions necessarily decided in a summary affirmance" may not be reexamined by lower courts but refused to decide what had been "necessarily decided". The court stated that it would be "a highly speculative exer-

cise" to determine which of eight possible violations found by the three-judge court were affirmed or not affirmed by the Supreme Court (A13).

In determining remedy, it is essential to know which violation and what incremental segregative effect is being redressed. *Dayton Board of Education v. Brinkman, School District of Omaha v. United States, Brennan v. Armstrong, supra.* Conceivably, a given suburban district might have been implicated in one violation but not the others. Or, possibly, an incremental segregative effect may appear in a given suburban district as flowing from one violation but not the others. As the three dissenting judges observed, it is impossible to fashion a remedy without knowing the specific violation that is involved or the incremental segregative effect therefrom. The dissenters stated:

> ". . . After all, it is by no means obvious what the racial composition of the affected schools would be at present if the eight violations found by the district court had not occurred. One could argue in good faith that but for those violations the ratio of black students to white students would be approximately the same in all the affected schools. One could also argue in good faith that even if those eight violations had never occurred, the racial composition of the affected schools would not be appreciably different from what it is today. I do not see how a proper remedial plan can be developed until the court assesses the continuing effects of any valid interdistrict violations. Until such an assessment is made, it will be impossible to determine whether or not the required causal connection exists between the violations and the remedies which the parties may propose." (A29).

These observations were applied by the dissenters to the total desegregation area, generally. However, they apply to each suburban district, specifically.

The fact that one or more suburban districts are implicated in a given violation does not mean that all were. The fact that there may be an incremental segregative effect in one or more does not mean that there was in all of them. The petitioners, Claymont and Stanton, have the right to have these findings made with respect to them based on a sufficient record. This right has been denied them. We submit that the decisions of this Court call for a review of this issue and of the case below.

If review is granted by this Court, we will be prepared to show that there has been no finding and that there is no basis on which a finding may be made that either Claymont or Stanton were implicated in any of the suggested violations nor that there was any incremental segregative effect in either district flowing from any of the suggested violations.

V. An Essential Basis for the Trial Court's Finding of a Predicate for an Inter-district Remedy Was the Cumulative Effect of Several Suggested Violations in Which Neither Claymont nor Stanton Were Implicated.

In his dissenting opinion from this Court's summary affirmance, Mr. Justice Rehnquist correctly noted that the three judge court relied in large measure upon the cumulative effect of various "governmental policies" which encouraged and assisted "in part" the demographic shift of whites to the suburbs outside Wilmington and the growth of identifiably black schools in Wilmington. Justice Rehnquist observed that the majority judges of the three judge court below determined that "the cumulative effect" of these policies "constituted segregative acts with interdis-

trict effect" and found a basis for inter-district relief. *Buchanan v. Evans, supra.* Reference to the lower court's opinions confirm the accuracy of Justice Rehnquist's observations of the lower court's thesis.

In the opinion of March 27, 1975, reported at 393 F. Supp. 428, the Court discussed the various possible contributors to the racial imbalance or disparity between the city and the suburbs using such ambiguous comments as to cause and effect as "assisted", "encouraged", "evident effect", "may have", "to some extent", and "undoubtedly served to augment" the racial disparity between the city and its suburbs. 393 F. Supp. 434-437. The court summarized that since *Brown,* governmental authorities (other than suburban school officials) had contributed to the racial isolation of the city from the suburbs by a variety of federal, state and local conduct which assisted the white exodus from the city. The governmental authorities were said to have condoned and encouraged discrimination in the private housing market. The court concluded that "governmental authorities are responsible to a significant degree for the increasing disparity in residential and school populations" over the last 20 years and that "This conduct constitutes segregative action with inter-district effects" (393 F. Supp. at 438).

In the three-judge court's opinion of May 19, 1976 reported at 416 F. Supp. 328, the court referred to its prior opinion saying that it had ruled that the segregation of Wilmington schools had never been erased "and that this segregation resulted from a combination of factors, including demographic and housing patterns initiated and supported by state action" in addition to the enactment of the Educational Advancement Act (416 F. Supp. 334). The court further stated at p. 339 that:

> "We need not catalogue the set of violations with regard to housing and zoning set forth in the last

> opinion *affirmed by the Supreme Court.* Nor need we rehearse the reasons why we held the Educational Advancement Act to be an unconstitutional 'redrawing of district lines'. It suffices to say that the acts described in the prior opinions were the acts of the State and its subdivisions, and had a substantial, not a de minimis, effect on the enrollment patterns of the separate districts." (Emphasis supplied, A52)

At p. 343, the court stated:

> ". . . Moreover, state action was also found to be responsible here for the racial identifiability of the suburbs and the city, through enforcement of racial covenants, zoning and encouragement and support of private discrimination in housing . . ." (A59)

Thus, in addition to the holding with respect to the Educational Advancement Act, the lower court made a separate finding of the existence of a predicate for interdistrict relief on the basis of the "cumulative violation" concept rejected by this Court in *Dayton.* Further, the cumulative violation and effect theory of the lower court is based on a series of suggested violations in which the petitioners, Claymont and Stanton, had no part. No findings were made of their implication or involvement. No findings were made with respect to incremental segregative effect flowing from these suggested violations or the cumulative effect thereof within the two districts.

In refusing to review the liability issue in this case, the Court of Appeals permitted the cumulative violation and effect findings of the lower court to stand because it would be "highly speculative" to do otherwise. We submit that the petitioners are entitled to a judicial review of this patently erroneous holding.

CONCLUSION.

The case below, a metropolitan school desegregation case, involves the restructuring of local governmental entities by federal court order. The predicate for such federal judicial interference has not been reviewed. All of the seven judges of the Court of Appeals for the Third Circuit, sitting en banc, concluded that they were precluded from reviewing the basic liability issues of this case and that only this Court could do so.

For the reasons set forth herein, we respectfully submit that this Court should grant the Petition for Writ of Certiorari to review and reverse the judgment below.

Respectfully submitted,

JAMES T. MCKINSTRY,
RICHARDS, LAYTON & FINGER,
4072 DuPont Building,
Wilmington, Delaware. 19899
Attorneys for Claymont School District and Stanton School District, Petitioners.

APPENDIX A.

We adopt and incorporate by reference Appendix A to the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit filed by the Delaware State Board of Education in No. 77-131.

APPENDIX B.

We adopt and incorporate by reference Appendix B to the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit filed by the Delaware State Board of Education in No. 77-131.

APPENDIX C.

We adopt and incorporate by reference Appendix C to the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit filed by the Delaware State Board of Education in No. 77-131.

APPENDIX D.

IN THE UNITED STATES DISTRICT COURT
For the District of Delaware

BRENDA EVANS, et al.,
Plaintiffs,

v.

MADELINE BUCHANAN, et al.,
Defendants.

Civil Action
Nos. 1816-1822

Judgment.

This 15th day of June, 1976, for the reasons stated in the Opinion of the Court issued May 19, 1976.

IT IS HEREBY ORDERED AND DECREED:

1. (a) That this action shall be maintained as a class action, and the class shall consist of all black and Hispanic children presently enrolled in the Wilmington, Delaware School system, and that the representation of the Intervening Plaintiffs Pacheco, Rodriguez, et al., is limited to the protection of the interests of the Hispanic students who are members of the class, in receiving bilingual education;

(b) That the class so defined shall be represented by the named plaintiff before the Court who are members of the class, through their parents, legal guardians, or next friends;

2. That the school in that area of Delaware north of the northern line of the Appoquinimink School District; that is, the area presently comprised of the Alfred I. Du-

Pont, Alexis I. DuPont, Claymont, Conrad, DeLaWarr, Marshallton-McKean, Mount Pleasant, Newark, New Castle-Gunning Bedford, Stanton, and Wilmington School Districts, shall be desegregated in accordance with the Opinions of this Court, and shall be recognized into a new or such other new districts as shall comply with the Opinion of this Court issued on May 19, 1976;

3. The State Board of Education shall:

(a) Appoint a board of five members (the "New Board") to oversee the operation of the schools of the area as defined in ¶ 2 of this Order, such members to be appointed so that one member of the New Board shall be a member of the present Newark School Board; one member of the New Board shall be a member of the present Wilmington School Board; one member of the New Board shall be a member of either the present New Castle-Gunning Bedford, or DeLaWarr or Conrad School Boards; one member of the New Board shall be a member of the present Stanton, Marshallton-McKean, or Alexis I. DuPont School Boards; and one member of the New Board shall be a member of either the present Alfred I. DuPont, Mount Pleasant or Claymont School Boards; and that the members of the New Board so appointed shall serve until their successors are selected and duly qualified;

(b) Cooperate and assist the New Board in all planning and operational phases of the implementation of a plan which shall be designed to desegregate the schools in accordance with the Opinion of the Court issued May 19, 1976;

(c) Exercise appropriate supervision of the New Board or its successor or successors and its exercise of authority;

(d) Set a date certain for the transfer of full responsibility for the operation of the schools to the New Board or such successor or successors designated by state law; such date to be prior to September 1, 1977;

(e) Be responsible, together with the presently existing boards, for any expenses created by the operation of the New Board or its successor or successors until such time as the New Board or its successor or successors, in a transfer of authority, receive taxing power, in accordance with ¶ 3(d) hereof, and state law;

4. The New Board or its successor or successors shall:

(a) Commence immediately upon appointment to consider any necessary planning for the transfer to it of operating authority;

(b) Prepare a plan for the operation of unitary desegregated schools, in accordance with the Opinion of May 19, 1976;

(c) Accept responsibility for the operation of the schools, beginning with the Fall, 1977 term, in accordance with a timetable to be set by the State Board of Education;

5. The existing boards of the present school districts shall assist in the transfer of authority, and shall be liable together with the State Board for the expenses of the New Board or its successor or successors, until such time as the New Board or its successors receive taxing authority, in accordance with ¶ 3(d) hereof, and state law, the aforesaid expenses of the New Board shall be borne by the existing boards of the present school districts and by the State Board; each existing board's contribution being assessed in proportion to the ratio which the assessed value of taxable property in that present school district bears to

the total assessed value of taxable property in all districts; provided, however, that each existing board's contribution shall be reduced from the aforesaid sum by virtue of the State Board's required contribution, which contribution shall equal the largest contribution required from any of the local boards.

6. The State Board, in cooperation with the existing local districts, may assign members of the professional staff of the Department of Public Instruction or the local districts, to assist the New Board during the period prior to September, 1977;

7. Upon the transfer of full authority to the New Board or its successors, the present boards shall, in accordance with state law, cease to exist;

8. The provisions of Paragraph 1 through 7 of this Order in accordance with the Opinion of May 19, 1976, shall be inapplicable to the New Castle County Vocational-Technical School District.

9. The application of the plaintiff class for an injunction to restrain the payment by the State of any subsidy for the transportation of students to private schools is denied;

10. The provisions of Paragraphs 2 and 7 of this Order shall be stayed in accordance with the Opinion of May 19, 1976; and

11. The three-judge panel convened for the purpose of considering the above matters is dissolved, and supervisory jurisdiction will remain in the District Court, in accordance with the provisions of the Opinion of May 19, 1976, and the mandate of the Court of Appeals for the

Third Circuit in *Evans v. Ennis*, 281 F. 2d 385, 391 n. 1 (1960).

/s/ JOHN J. GIBBONS,
John J. Gibbons,
United States Circuit Judge.

/s/ CALEB M. WRIGHT,
Caleb M. Wright,
United States Circuit Judge.